IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 108 OF 2005

Ahmad Bi Shahmir Khan
Daruwala and others. ... Appellants.

V/s

Rabiya Bi Shahmir Khan
Daruwala. ... Respondent.

Anil Kumar Patil for the appellants.

P.K.Dhakephalkar with Amol P. Mhatre
for the respondent.

CORAM: A.S. OKA, J.

DATE: 1st March, 2005.

P.C. :

. Heard learned counsel appearing for the parties.

2. The challenge in this appeal is to the judgment and order dated 4th March 2004 passed by the learned trial Judge below Application for temporary injunction Exh.5 filed by the Respondent. By the said order, present Appellants/Defendants have been restrained from creating third party interests in respect of the suit property.

3. Shri Patil, learned counsel appearing for the Appellant relying upon the copy of the Plaint in

Regular Civil Suit No.137 of 1989 filed by the Respondent submitted that in the said suit the original Plaintiff/Respondent had claimed separate share in the suit property. He submitted that after the said suit was dismissed for default, a fresh suit is not maintainable and, therefore, injunction could not have been granted.

4. Learned counsel appearing for the Respondent has supported the impugned judgment and order.

5. The suit filed by the Respondent in the trial Court is a substantive suit claiming possession of a separate share in the suit property. Prima facie, it appears that the earlier suit was simplicitor for a perpetual injunction. The order of dismissal passed in the said suit is not placed on record.

6. What is the effect of dismissal of the earlier suit is a question which will have to be considered at the trial of the suit after examining the Plaint and the order passed thereon.

7. The suit claims possession of separate share in the suit property and an interim order has been passed restraining the Defendants from creating any third party interest.

8. The order passed by the learned trial Judge is on consideration of prima facie case. The order is a discretionary order and no interference is called for.

9. Hence there is no merit in the appeal and the same is dismissed with no order as to costs. It is made clear that the trial Court will decide the suit on its own merits without being influenced by the tentative findings recorded in the impugned order and the confirmation of the impugned order by this Court.

10. The parties and the concerned Court to act on an authenticated copy of this order.

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